

IN THE
Supreme Court of the United States

October Term, 1975

No. 75-972

Herbert Mildner, *Appellant,*
vs.

FRANK A. GULOTTA, individually and as Presiding Justice,
Appellate Division of the Supreme Court of the State of
New York, Second Judicial Department, *et al.,*
Appellees.

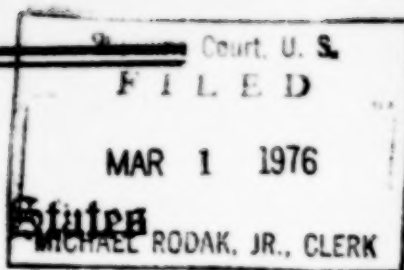
On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF APPELLANT MILDNER IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM

Herbert Mildner, Esq.
Pro Se
75-40 Austin Street
Forest Hills, New York 11375
(212) 544-0268

Of Counsel:

Lippe, Ruskin & Schlissel, P.C.
114 Old Country Road
Mineola, New York 11501
(516) 248-9500



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STATEMENT

This brief is submitted on behalf of Appellant Herbert Mildner in opposition to the motion of the Appellees, dated February 11, 1976, which seeks to dismiss the appeal from the order of the three-judge court, or in the alternative, to affirm the order of that Court.

THE MOTION TO DISMISS OR AFFIRM SHOULD BE DENIED AND THIS COURT SHOULD NOTE JURISDICTION.

One wonders about the reluctance of the Appellees to permit prompt consideration of this matter by this Court, especially in light of their own reference to alleged criticism being "leveled at the legal profession for" delays in processing disciplinary proceedings affecting New York lawyers (Appellees' Motion to Dismiss or Affirm, p.5).

In light of this concern, it would seem that Appellees would wish to have this issue resolved by our highest court as promptly as possible.

Appellees also choose to ignore the very significant differences between this case and those relied upon by them, MTM, Inc. v. Baxley, 420 U.S. 799 (1975) and Mendez v. Heller, 420 U.S. 916 (1975). Neither of those cases involved the questionable constitutionality of procedures affecting the very ability of a duly licensed professional to continue to practice his profession. Judge Neaher found this question "not without some force" and of a "serious procedural and substantive" nature; Judge Moore found it of "sufficient importance to be resolved by our highest court"; and Judge Weinstein

found the procedure to be constitutionally infirm. This alone is a sufficient basis for distinguishing those cases.

There are several additional compelling reasons why the motion to dismiss or affirm should be denied and why this Court should note jurisdiction:

1. Two of the three judges below (Judges Moore and Weinstein) unquestionably passed on the constitutional issues presented. Surely, no argument could be made concerning appealability if Judges Moore and Neaher had simply found the procedures constitutional and had never mentioned abstention; in fact, a direct appeal has been expressly held to be permitted in such a situation. Anderson v. Martin, 372 U.S. 904 (1963). Thus, the mere fact of a split in the three-judge court is

irrelevant.

2. MTM itself holds that a direct appeal to the Supreme Court will lie under §1253 "where such order rests upon resolution of the merits of the constitutional claim presented below" (MTM at p.804). From this starting point we ask simply: Did not two of the three judges below (Weinstein and Moore) rest their determination on the merits of the constitutional claim presented? Of course they did; Judge Weinstein found the constitutional claim to be valid and Judge Moore found it to be without validity. Thus, the case is clearly one where two of the three members of the Court below rested their determination, albeit differently, on the merits of the constitutional claim presented.

3. Further, the order below does

not rest upon the absention doctrine. Try as Appellees might, they cannot overcome the fact that only one Judge, Judge Neaher, even remotely based his ruling on the abstention doctrine. Judge Moore specifically disassociated himself from the abstention doctrine.* How then can it be claimed that the ruling below was based on absention? Appellant fails to understand any rational basis for such a contention.

To say the least, it is questionable whether Judge Neaher rested his determination on the abstention doctrine. Not only is most of his opinion directed to the merits

* Mr. Justice Douglas expressed his doubts about the ability of a single judge to dismiss based on the abstention doctrine. See dissenting opinion in MTM.

of the constitutional claims, his actions in staying the state disciplinary proceedings pending appeal is inherently inconsistent with any abstention.

Moreover, not only did Judge Neaher discuss the constitutional claims, he specifically resolved them, albeit adversely to Appellant. Thus, at the conclusion of his analysis of Appellant's due process claims, Judge Neaher stated that:

"We [presumably he and Judge Moore] agree...that there is no violation of equal protection in the procedure adopted by New York for the review of disciplinary proceedings." Mildner Appendix to Jurisdictional Statement, p.24a.

Further, at the portion of his decision and order entitled "The Due Process Claim", Judge Neaher wrote:

"The critical question is whether it can truly be said that any of those procedural features operate to deny accused attorneys a fundamentally fair hearing of the charges against them, thereby resulting in an unconstitutional application of the states. We [presumably he and Judge Moore] think not." Mildner Appendix to Jurisdictional Statement, p.24a.

With regard to certain additional claims set out by the Appellants, Judge Neaher wrote:

"We [presumably he and Judge Moore] would therefore reject those claims raised in the Mildner and Gerzof complaints which suggest that the lack of evidentiary basis for the decisions was itself a denial of due process or equal protection, or constituted, when the resultant discipline was decreed, cruel and unusual punishment." Mildner Appendix to Jurisdictional Statement, p.27a.

Thus, we have Judge Neaher [and

Judge Moore] "agreeing" that there is no violation of equal protection; "thinking" there is not an unconstitutional application of the statutory procedure; and "rejecting" the claims of denial of due process and equal protection and of cruel and unusual punishment being imposed. Is anything else necessary to constitute a "resolution of the merits of the constitutional claim[s]" presented, within the meaning of MTM? Judge Neaher could have done nothing more on the merits; he "resolved" those issues against Appellants. And his order staying the state procedures pending appeal is a further indication of his "resolution" of the merits.

4. Why force Appellant to go to the Court of Appeals? Three judges have already passed on the merits, one of them

a Court of Appeals Judge. Will it be of any aid to the Court or the Federal judicial system to have three more Court of Appeals' Judges pass on the issues? As Mr. Justice White so aptly stated in MTM, to force Appellant to go to the Court of Appeals would be an "exorbitant expenditure of judicial manpower, and without reason..." MTM, p.806.

5. Why should this Court not hear the case now? Appellees have set forth no compelling reasons why this Court should now refuse jurisdiction. Their argument concerning the Second Circuit Court of Appeals' assumption that this Court would not note jurisdiction (Motion to Dismiss or Affirm, p.5) is both speculative and specious. If there were a real desire to fully, finally,

and promptly determine the constitutionality of the process for disciplining attorneys in New York State, Appellees would be urging, rather than objecting to, this Court's noting jurisdiction.

Appellees forget, continually, that the very livelihoods of at least three professionals are at issue here. Why must this matter, acknowledged by all to be of great significance to the entire Bar of the State of New York (and perhaps the Nation) become bogged down in a procedural morass of questionable technicalities. While Appellant does have the benefit of a stay of his suspension, the stigma of that suspension cannot be removed. Every effort should be made to fully and finally determine this matter on the merits as quickly as possible.

CONCLUSION

For the reasons stated herein and in Appellant's Jurisdictional Statement, as well as in the Jurisdictional Statements of Appellants Gerzof and Levin, this Court should accept jurisdiction of this appeal and reverse the decision below. In the event that this Court determines that the requisite jurisdiction is not present, it is respectfully requested that it remand the case to the Court below with instructions to enter a fresh order and judgment so that a timely appeal may be prosecuted to the Court of Appeals.

Respectfully submitted,

HERBERT MILDNER, ESQ.

Pro Se

75-40 Austin Street

Forest Hills, New York 11375

Tel. (212) 544-0268

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Of Counsel:

LIPPE, RUSKIN & SCHLISSEL, P.C.
114 Old Country Road
Mineola, New York 11501
Tel. (516) 248-9500

see

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